

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

**IN THE MATTER OF
RONALD KEEN, RICHARD FIGURELLE,
JOHN DOHERTY and PHYLLIS RYAN,**

Grievants,

v.

DEPARTMENT OF CORRECTION,

Agency.

**DOCKET NOS. 98-02-144; 98-02-145;
98-02-146; 98-02-147**

ORDER GRANTING MOTION TO DISMISS

BEFORE Dallas Green, John F. Schmutz, Esquire, and John W. Pitts, Members, constituting a lawful quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES

For the Grievant:
Jeffrey M. Weiner, Esquire
1332 King Street
Wilmington, DE 19801

For the Agency:
Joelle P. Hitch
Deputy Attorney General
Office of the Attorney General
820 N. French Street
Wilmington, DE 19801

BACKGROUND

The Board has consolidated the above-captioned matters for convenience in consideration. Each of the individuals is employed by the Department of Correction ("DOC") as a Probation and Parole Supervisor. The Grievants assert that as Probation and Parole Supervisors they have been improperly exempted from the Fair Labor Standards Act (Chapter 2 of Title 29 of the United States Code.)

COPY

By Motion dated March 6, 1998, DOC seeks the dismissal of these grievances on the basis that there is no complaint which concerns the implementation or application of the Merit Rules or Statutes as required under Merit Rule 21.0120. The Grievants have responded through counsel on May 29, 1998 that they have been denied compensation for stand-by duty based upon the DOC determination that Probation and Parole Supervisors are exempt from coverage under the Fair Labor Standards Act and that the Grievants are attempting to contest the factual basis upon which DOC concluded that their classification is exempt.

DISCUSSION

These Grievants seek supplemental pay equal to Five Percent (5%) of the employee's paygrade midpoint for stand-by duty. See Merit Rule No. 5.1440. This entitlement goes, under certain circumstances, to an employee in a position or a class that is entitled to overtime pay under the Fair Labor Standards Act. (29 U.S.C.A. § 201 et seq.) ("ACT") The DOC has determined that these Grievants do not qualify, since they are exempt from overtime pay under the ACT. Grievants wish to contest the factual basis for such exclusion.

The Fourth Step grievance decision for these Grievants correctly determined that there is no Merit Rule or Merit System statutory provision concerning the allocation of positions to exempt or non-exempt status under the Fair Labor Standards Act and that the Merit Rules do not recognize or permit a grievance to be filed over this matter. That Fourth Step grievance decision was by its terms, to be provided immediately to the Deputy Director for Classification, Compensation and Benefits, State Personnel Office, with the request that the Probation and Parole class title be reviewed to determine whether it has been properly exempted from the Fair Labor Standards Act. At the argument before the Board on the Department's Motion to Dismiss, the Grievants' attorney advised the Board that there had been no notice to the Grievants of any determination of this issue. Counsel for the Department expressed the belief that such a determination had in fact been made in favor of the Department's position.

It is the view of the Merit Employee Relations Board that this matter is governed by 29 Del. C. § 5955 which provides in relation to the Fair Labor Standards Act, in pertinent part:

... [T]he Director of the Office of State Personnel shall have the authority to implement this section, including, but not limited to, the authority to determine where conflicts exist between state law or merit rules and the federal act, and to resolve such conflicts by appropriate rulings and regulations.

In the view of this Board, the matter is therefore properly before the Director of the Office of State Personnel for a determination of whether or not the Probation and Parole class title has been properly exempted from the Fair Labor Standards Act

Merit Rule No. 20.0200 provides that a grievance is an employee complaint which concerns the application of the Merit Rules or the Merit System statute. The determination of the propriety of the application of exemptions from overtime provisions of the Fair Labor Standards Act does not meet that test. The matter is not properly before the Merit Employee Relations Board as a grievance and will be dismissed.

ORDER

On the basis of the foregoing, the Motion of the Department is granted and the above-captioned matters are **DISMISSED**. The Office of State Personnel is requested to provide the Grievants with a written response to the request by its Hearing Officer to the Deputy Director for clarification, compensation and benefits for a review of the exempt status of the Probation and Parole Class.

BY ORDER OF THE BOARD.

Susan L. Parker, Esquire, Chairperson*

Dallas Green, Member

John W. Pitts
John W. Pitts, Member

Robert Burns, Vice-Chairperson**

John F. Schmutz, Esquire, Member

* Chairperson, Susan L. Parker, Esquire, did not participate in these matters because of a litigation conflict with the Department of Correction.

** Vice-Chairperson, Robert Burns was unavoidably absent from the argument and deliberation.

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the request of whether the appointing agency acted in accordance with the law. The burden of proof of any such

appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.
- (c) the appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date:

Nov. 19, 1998 *gt*

Distribution:

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Agency's Representative

Merit Employee Relations Board

Susan L. Parker, Esquire, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

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